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**Disentangling Consummated Mergers – Experiences and Challenges – Note by
Argentina**

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More documents related to this discussion can be found at
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Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03495492

Argentina

1. Argentina's Competition Defence Act (LDC, for its acronym in Spanish) was amended in 2018 and, with it, the mergers and acquisitions control regime were also reformed. One of the main transformations was in relation to the notification system. Indeed, the new Act established an exclusively ex-ante notification system, whereas the previous Act contemplated a dual system—at least from a legal perspective—that in practice became an ex-post notification regime. The notification remains mandatory for all mergers that comply with the characteristics stipulated by the LDC and, once the transaction gets clearance by the Argentinean competition authority, the National Commission for the Defence of Competition (CNDC, for its acronym in Spanish), they may not be subject to further review, as long as the decision has been issued on the basis of complete, accurate and reliable information.

2. The CNDC is currently in a transitional period. Between the ex-post and ex-ante notification system, the Objection Reports—another incorporation of the new LDC—have proven to be a fundamental tool to deal with transactions that raise competition concerns. Indeed, they have allowed the agency to communicate the problems detected by the CNDC to the involved parties more effectively and in a shorter period, as well as becoming useful in the process of negotiation of commitments aimed at mitigating the harmful effects identified.

3. To weigh the benefits and detriments of an ex-post versus an ex-ante merger control system and to consider the viability of further analysis in certain consummated transactions when competition concerns arise in the affected markets, this note is structured as follows. In the first section, a comparison is made between the previous and the current LDC, particularly regarding merger control regime. The characteristics of the current transitional situation that the CNDC is going through in connection with the notification system are also considered in this section. The second part examines the BRINK'S ARGENTINA/MACO case, among the last mergers notified under the previous LDC, in which the approval was subject to the compliance of a commitment that considers both structural and behavioural remedies. The third section considers how Objection Reports have proven to be a useful instrument to reduce the time required to analyse a transaction, notify the involved parties of the harmful effects identified and design compromise agreements that may mitigate those effects, thus representing a necessary intermediate step on the road towards an ex-ante notification regime. As a conclusion, the fourth section summarises the challenges that await the CNDC in relation to the merger control system and the agreement of remedies aimed at alleviating the competition problems caused by some transactions.

1. The current legal framework

4. In Argentina, in August of 1999, Act N° 25.156 was enacted. It was the first comprehensive regulation for the defence of competition, which amongst other innovations, incorporated the procedure for mergers control. Indeed, Chapter III of the mentioned Act established the qualitative and quantitative parameters of the transactions that had to be subject to a prior authorisation request. Section 8 of the Act stipulated notification thresholds based on turnover and indicated that the economic operations in question had to be notified for review to the competition authority "prior to or within one week from the date of the conclusion of the agreement, the publication of the purchase or

exchange offer, or the acquisition of a controlling interest". In other words, although Act N° 25.156 established that mergers reached by the regulation had to be notified to the authority before the consummation of the transaction, or one week after its completion, in practice this implied that most mergers or acquisitions were notified "ex-post"—that is, once the transaction was consummated.

5. In 2018, the aforementioned regulation was replaced by Act N° 27.442, which introduced numerous changes to the competition legal framework, including several amendments to the system of notification and analysis of economic concentrations. Section 9 of the new LDC provides, unlike the previous Act, that the corresponding merger must be notified for review "prior to the date of the completion of the act or the materialisation of the takeover, whichever occurs first, to the National Competition Authority". In this sense, the current LDC in Argentina stipulates an ex-ante notification system, as established in most antitrust regulations around the world.

6. The current period is one of transition between regulatory regimes. As established in Act N° 27.442, mergers and acquisitions may continue to be notified within one week of their closing date—following what was stipulated by Act N° 25.156—until one year after the National Competition Authority (ANC, for its acronym in Spanish) becomes operational, which has not yet happened. Therefore, the enforcement authority of the LDC in Argentina, which continues to be the CNDC together with the Secretariat of Domestic Trade until the formation of the ANC, is in a moment of transition in which, although transactions are still notified under an ex-post system, the new LDC provides new tools for the analysis of mergers and acquisitions, which expedite the processing of this type of cases.

7. Among the procedures introduced by the new LDC is the so-called Objection Report (IO, for its Spanish acronym), the purpose of which is to carry out a preliminary analysis of transactions that give rise to competition concerns. The IO makes it possible to assess the effects of an economic operation that the authority considers having the potential to restrict or distort the competition. It also allows to communicate the involved parties, within a moderate period and through a substantiated report, the concerns it has regarding its completion, before taking the final decision. Following the publication of the IO, the authority must summon the parties involved to a special hearing, to deliberate on possible measures to mitigate the negative effects on competition, which will be later considered at the time of the final decision.

8. In this sense, the IO also contributes to channel, through a formal procedure, the negotiations between the competition authority and the parties involved regarding possible remedies to alleviate the potential effects of the transaction. In this way, the IO, even in a transitional context such as the current one, in which notifications continue to be "ex-post", has allowed the CNDC to communicate more quickly the competition concerns raised by the mergers and acquisitions, and to initiate discussions regarding the possible remedies within a moderate period of time after the notification of the transaction.

2. The BRINK'S ARGENTINA/MACO case and the cash management and transportation market

9. In July 2017, the acquisition of MACO CAUDALES and MACO LITORAL by BRINK'S ARGENTINA was notified to the CNDC. Given that at that moment the previous LDC was still in force, the notification was made "ex-post", that is, once the transaction had been completed. Likewise, under the provisions of Act N° 25.156, and because the National Commission found that the transaction under analysis raised competition

concerns, the CNDC issued a decision of approval that was subject to the compliance of the agreed structural and behavioural remedies.

10. The acquiring company and the target companies offer cash management and transportation services and other associated services (ATM management, cash counting, payroll and treasury, among others) in Argentina. In addition, the acquiring group also offers physical security, electronic security and security consultancy services through its subsidiary BRINK'S SEGURIDAD CORPORATIVA.

11. Considering the economic activities of the companies involved, the CNDC analysed the horizontal effects generated by the operation in the cash management and transportation services market. Considering that these are predominantly local and urban services, the focus was placed on the geographical areas in which overlaps were observed between the companies in terms of their coverage: BRINK'S ARGENTINA, with almost national coverage, with presence in the main urban centres of the country, and MACO CAUDALES and MACO LITORAL, with regional coverage, limited to the Metropolitan Area of Buenos Aires (AMBA, for its Spanish acronym), the north of the province of Buenos Aires and the provinces of Santa Fe and Entre Ríos. Based on these overlaps, the relevant geographic markets of AMBA, Mar del Plata and Rosario were defined.

12. When analysing the supply structure of the cash handling services market in the country prior to the operation under analysis, it was observed that only two companies in Argentina had national coverage. On the one hand, PROSEGUR (who was not involved in the transaction), is the main supplier in the market, with a market share of around 55%. On the other hand, the acquiring company, BRINK'S ARGENTINA, with a market share of around 20%. MACO group was positioned as a third competitor at a national level in terms of share (around 14%) but had a regional geographic scope. The remaining competitors were characterised by being small in terms of market share and with very limited coverage of one or two urban centres.

13. In this respect, the cash management and transportation services market already showed a high degree of concentration before the transaction under analysis. Given the concentrated market structure and the predominance of only two competitors, with a clear leadership of PROSEGUR, the investigation was oriented towards the analysis of the coordinated effects that would be generated by the disappearance of MACO as a competitor and the consolidation between the second and third provider nationwide.

14. In fact, in the decision issued by the CNDC, it was pointed out that, as of the present operation, BRINK'S ARGENTINA would consolidate as the second provider of cash handling services, reaching a 35% market share, following PROSEGUR, who already was the leading provider of this type of services throughout the country. At the same time, it was noted that in the three local markets analysed —AMBA, Mar del Plata and Rosario— it was verified that more than 93% of the supply would remain in the hands of PROSEGUR and BRINK'S ARGENTINA. At the same time, high barriers to entry were identified, the main ones being linked to the armoured and licensing of the transport trucks —an essential asset to carry out the activity of cash transportation.

15. In sum, the CNDC found that the acquisition of MACO by BRINK'S ARGENTINA raised competition concerns in the local supply of cash management and transportation services. In an attempt to mitigate the harm arising from the transaction, the National Commission agreed with BRINK'S ARGENTINA on the compliance of a series of structural and behavioural measures. As aforementioned, given that the case had been notified when the previous LDC was still in force, the harmful effects of the transaction were informed at the last stage of the investigation process. The former Act did not set out any formal hearing to initiate negotiations aimed at reaching a compromise with the parties,

so these talks, although they took place within the framework of the case file, did not have a defined procedural stage. Once the remedies were agreed upon, the CNDC issued an approval decision subject to the compliance of the commitment, as established by Section 13.b of Act N° 25.156.

16. The structural measures included the divestiture of 40 operational transport trucks corresponding to the AMBA fleet and one corresponding to the Mar del Plata fleet to an actual or potential local competitor other than PROSEGUR, as well as the relocation of 20 operational transport trucks corresponding to the AMBA fleet to other geographical areas of Argentina where PROSEGUR provides cash management and transportation services. In addition, the behavioural measures consisted of the request of a semi-annual report by BRINK'S ARGENTINA to the CNDC that should contain information regarding: the prices submitted to the Central Bank of Argentina; the status of compliance of the divestment commitments, including the offers received, the units sold and the units pending; and the status of compliance of the relocation of the armoured trucks from AMBA.

17. As required by the previous LDC, the decision to approve the transaction was conditioned upon the compliance of the commitment. Although the transaction was approved three years after its notification, the agreement was feasible to implement and was able to address the competition concerns in the local cash handling services markets. Indeed, the structural remedy focused on the divestiture and relocation of assets essential to the cash transport business —the armoured trucks. This made it possible to mitigate the effects of the operation, without incurring in impracticable solutions.

18. It should be noted that the BRINK'S ARGENTINA/MACO case was the first concentration in the history of the CNDC that received conditional approval exclusively because of the existence of coordinated effects. The pre-existing concentration in the cash handling market, which persists despite the agreed divestitures and relocations, the recent accusations of collusion by the Chilean National Prosecutor's Office against certain cash-in-transit companies (including a subsidiary of BRINK'S), and the sanctions issued by the CNMC in Spain and by the COFECE in Mexico in recent years for collusive agreements between cash-in-transit companies, indicate that this is a market that the CNDC should continue to monitor closely. In this sense, although the LDC does not contemplate the review of mergers that have already been approved under conditions of complete and reliable information, market investigations can be a tool of some relevance when analysing highly concentrated markets.

3. Preliminary observations on the implementation of Objection Reports in the mergers and acquisitions control system

19. As already mentioned, Act N° 27.442 establishes that in the case of those economic concentrations that have the potential to restrict or distort competition, the competition authority must prepare and issue an Objection Report. The issuing of the report is a mandatory instance where the problems detected must be documented with due precision. In the first place, it must be made available to the public. Secondly, the report must be notified to the involved parties so that they can offer the evidence they consider appropriate in the exercise of their right of defence. This allows the parties to rebut the objections raised and/or to offer possible remedies. Finally, the competition authority should convene a special hearing to consider possible measures to mitigate the adverse effects on competition.

20. Since its implementation in May 2018, the CNDC has issued six Objection Reports, in the context of the following cases (in order of publication): DISNEY/FOX,

SYNGENTA/NIDERA, MIRGOR/BRIGHTSTAR, CMQ/TEMPLE, LINDE/PRAXAIR and ARCOR/INGREDION. While in the first two years of its implementation, the investigation and publication of IOs took almost as long as the issuance of a final decision in those cases that raised certain competition concerns and received a conditional approval under the former LDC, the IOs' completion times were significantly reduced as of 2020. Indeed, both the MIRGOR/BRIGHTSTAR and ARCOR/INGREDION IOs notified in October 2020 and August 2021, respectively, were objected to by the CNDC after eight months of investigation, while the CMQ/TEMPLE transaction, notified in August 2021, was objected to in just two months.

21. In the SYNGENTA/NIDERA, LINDE/PRAXAIR and ARCOR/INGREDION cases, remedies have not yet been agreed upon. In all three cases, the CNDC is in the process of negotiating possible remedies with the involved parties to mitigate the adverse effects of the operation. The MIRGOR/BRIGHTSTAR case involves the consolidation of two of Argentina's main mobile phone manufacturers. Given the effects that this operation would have on the domestic supply of mobile phones, the CNDC recommended to the Secretary of Domestic Trade to make the approval of the merger conditional upon the compliance of a commitment consisting of a set of ten behavioural remedies, a solution the Secretary recently confirmed.

22. The DISNEY/FOX case is a global transaction, which consisted of the acquisition of the sole control of TWENTY-FIRST CENTURY FOX, INC by THE WALT DISNEY COMPANY. In the OI, the CNDC warned that the operation would lead to a high concentration in the market for sports TV signals, where the combined entity would have seven of the nine existing signals, equivalent to a market share of 64%. At the same time, the company would control a large number of signals, thereby increasing its bargaining power in all TV signal markets in which it is active.

23. Based on this assessment, the CNDC required DISNEY a remedy of a structural nature consisting of the transfer of certain relevant assets to a new competitor: MEDIAPRO, a leading European audio-visual group that entered the Argentinean market via the acquisition of the assets of the divestiture. As a consequence of the divestiture order, DISNEY sold the main live sports content of each of FOX's basic subscription signals, as well as the Fox Sports brand. In addition, the CNDC also conditioned the approval of the acquisition to the compliance of a series of behavioural remedies that establish requirements on marketing and packaging conditions for five years, aimed at minimising the portfolio effects that the transaction could generate even after the divestiture has been completed.

24. As exemplified by the two cases mentioned above, BRINK'S ARGENTINA/MACO and FOX/DISNEY, the commitments agreed with the parties under the former and the current LDC, even under an ex-post notification regime, including both structural and behavioural remedies. As considered in the last section, one of the main modifications to the merger and acquisitions control system has been, so far (when the ex-ante regime is not yet in place), of a procedural nature with the incorporation of IOs.

4. The Challenges Ahead for the CNDC

25. For many years, the mergers and acquisitions control system established by the LDC in Argentina operated on the basis of an ex-post notification system. This involved certain difficulties, particularly for the resolution of those cases that raised competition concerns. The main problem resulted from the need to agree on a remedy that would be effective, that is, that would mitigate the identified harmful effects, and that could be

enforced even after the transaction had been consummated. On many occasions, as in the BRINK'S ARGENTINA/MACO case, the CNDC was able to reach compromises that met both conditions, even if this meant applying remedies of a structural nature.

26. Also, when transactions were international in scope, the ex-post notification system posed some challenges to the CNDC, as the timing of analysis and subsequent negotiation of remedies did not coincide with that of other competition agencies. In fact, in most cases, by the time these mergers were notified to the Argentine competition authority, the transaction had already been approved in other jurisdictions. In other words, when the CNDC reached a final decision, it did not have the possibility of weaving alliances with other agencies when negotiating remedies with multinational companies.

27. The entry into force of the new LDC meant the design of a new procedural system for mergers control, which included, among other modifications, an ex-ante notification and an instance of preliminary assessment before the final decision with the incorporation of IOs. Although the IO is a tool designed for a prior notification system, it has also proven to be a highly relevant and useful instrument for the CNDC in its current transitional context, in which the ex-post system is still in force. Indeed, the incorporation of IOs has made it possible to reduce the time between the notification of operations and the communication of the identified concerns to the involved parties and to channel through a formal procedure the negotiations on remedies. Likewise, the implementation of this procedure has proved to be an important transitional step on the National Commission's path towards the ex-ante notification system and, at the same time, it has made it possible to bring the CNDC's investigation and decision times closer to those of other competition agencies, particularly relevant when dealing with transactions of international scope.

28. Finally, it should also be noted that, despite the difficulties of the ex-post notification system mentioned above, on certain occasions, the analysis of an ex-post transaction scenario has been very useful to verify the economic effects of the transaction that were assumed prospectively. In this sense, and considering that the current LDC does not contemplate the review of mergers and acquisitions already approved, market investigations might develop into an important instrument to assess competition in certain markets, especially in those cases when the supply structure and competitive dynamics have been affected as a result of previous merger operations.